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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY,
t/a POWER 94

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether 18 U.S.C. 1304 and 1307, which restrict the right of a radio or television licensee to broadcast lottery-related advertisements, violate the First Amendment Free Speech Clause when applied to a licensee operating in a State that prohibits lotteries, but whose broadcasts extend into a State that operates a state lottery.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-9a, is unpublished, but the judgment is noted at 956 F.2d 263 (Table). The opinion of the district court, Pet. App. 10a-38a, is reported at 732 F. Supp. 633.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on May 20, 1992. Pet. App. 40a-41a. On

August 5, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 17, 1992. The petition was filed on that date, and was granted on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and 18 U.S.C. 1304 and 1307 are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

This is a First Amendment challenge by a radio licensee to Congress's regulation of the use of the airwaves to promote state-run lotteries. See 18 U.S.C. 1304 and 1307. Together, Section 1304 and Section 1307 create a bright-line geographic rule, under which a station's right to broadcast lottery advertising hinges on the State to which it is licensed: A station broadcasting from a State with a state-run lottery can broadcast advertisements about that State's lottery, or about any other state-run lottery. By contrast, a station broadcasting from a State without a state-run lottery cannot broadcast advertisements about any lottery. The validity of that bright-line rule is at issue in this case.

A. The Historical And Statutory Background

1. Lotteries have an ancient pedigree.[1] In pre-colonial England and during the early history of this nation, lotteries were a popular and respectable activ-

[1] The first king of Israel was chosen by lot. 1 *Samuel* 10:20-21.

ity.[2] Beginning in the Jacksonian period, lotteries fell into disfavor for various reasons, such as "animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall."[3] In fact, the dominant 19th century view was that lotteries were harmful to society.[4] States thus began to restrict or prohibit both private and state-run lotteries.

A major obstacle to the States' reform efforts was their inability to regulate lotteries that operated across state lines. States lacked authority to prosecute

[2] See Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 Cornell L. Rev. 923 (1978); J. Ezell, *Fortune's Merry Wheel: The Lottery in America* 1-59 (1960); A. Spofford, *Lotteries in American History*, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 173-195 (1893); National Inst. of L. Enforcement & Crim. Just., LEAA, U.S. Dep't of Justice, *The Development of the Law of Gambling: 1776-1976*, at 1-2, 500-519 (1977) [hereinafter *Gambling*]; G. Sullivan, *By Chance a Winner: The History of Lotteries* 12-43 (1972); D. Weinstein & L. Deitch, *The Impact of Legalized Gambling: The Socio-economic Consequences of Lotteries and Off-Track Betting* 8-9 (1974).

[3] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 927.

[4] See, *e.g.*, *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850), and *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880), both quoted at p. 22, *infra*; *Champion v. Ames* (*Lottery Case*), 188 U.S. 321, 355-356 (1903); J. Richardson, *A Compilation of the Messages and Papers of the Presidents 1789-1897*, H.R. Misc. Doc. No. 210, 53d Cong., 2d Sess. Pt. 9, at 81 (1898) (Special Message to the Senate and House of Representatives from President Harrison) ("It is not necessary, I am sure, for me to attempt to portray the robbery of the poor and the widespread corruption of public and private morals which are the necessary incidents of these lottery schemes.").

lotteries conducted in another jurisdiction or to regulate use of the mails to distribute lottery tickets and advertisements. Because the States had to attack lotteries within their borders "at the consumer level—a difficult, expensive, and unpopular task" [5]—they turned to Congress for help.

2. Congressional restrictions on lotteries date from 1827. In that year, Congress prohibited postmasters from serving as lottery agents and from receiving "lottery schemes, circulars, or tickets" free of postage. Act of Mar. 2, 1827, ch. 61, § 6, 4 Stat. 238. Forty-one years later, Congress made it a crime to deposit in the mails "any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196. In 1872, Congress limited the prohibition to the mailing of letters or circulars concerning illegal lotteries. Act of June 8, 1872, ch. 335, § 149, 17 Stat. 302. Four years later, however, Congress again extended the prohibition to all lotteries, including ones chartered by state legislatures. Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)); see *Horner* v. *United States*, 147 U.S. 449, 456, 466 (1893); *United States* v. *Noelke*, 1 F. 426, 427-429 (C.C.S.D.N.Y. 1880); *Lottery Circulars*, 15 Op. Att'y Gen. 203, 203-204 (1877).

The 1876 Act was challenged on the ground that it violated the First Amendment, but this Court rejected that argument in *Ex parte Jackson*, 96 U.S. 727 (1878). Nevertheless, the 1876 Act was widely viewed as an ineffective weapon against lotteries, particu-

[5] Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 931.

larly the then-infamous and powerful Louisiana Lottery, the only lottery still operating legally in 1890.[6] The Louisiana Lottery operated nationwide and used the mails as its principal means of obtaining revenues from the public in the other States,[7] deriving more than 90% of its multi-million dollar income from out-of-state bettors.[8] Because the Attorney General had concluded that the 1876 Act did not apply to newspapers,[9] that law did not stop the Louisiana Lot-

[6] *Exclusion of Lotteries from Postal Facilities*, 17 Op. Att'y Gen. 77, 77 (1881); see 21 Cong. Rec. 8714-8717 (1890) (summary of state laws prohibiting lotteries); 21 Cong. Rec. 8713-8714 (1890) (Rep. Evans). The Louisiana Lottery was chartered in 1868 ostensibly to raise funds for Charity Hospital in New Orleans. In fact, the lottery was directed by a New York gambling syndicate, which had bribed Reconstruction Era state legislators in order to obtain a charter granting the lottery a monopoly within the State. H. Asbury, *Sucker's Progress: An Informal History of Gambling in America from the Colonies to Canfield* 85 (1938); J. Ezell, *supra*, at 242-244; G. Sullivan, *supra*, at 52-56.

[7] *Use of the Mails for Lottery Purposes*, H.R. Exec. Doc. No. 22, 46th Cong., 2d Sess. 16 (1880) (Report from Assistant Attorney General Freeman to Postmaster-General Key); *id.* at 27-28 (Letter from New York City Post Office General Superintendent Forrester to New York City Postmaster James (Oct. 14, 1879)); *id.* at 28 (Letter from New Orleans Postmaster McMillen to Assistant Attorney General Freeman (Nov. 4, 1879)); *id.* at 28-29 (Letter from New Orleans Postmaster McMillen to Postmaster-General Key (Nov. 12, 1879)); 21 Cong. Rec. 8706 (1890); *id.* at 8711 (statement of Rep. Wilkinson); *id.* at 8717 (statement of Rep. Hitt); *id.* at 8721 (statement of Rep. Price); J. Ezell, *supra*, at 251.

[8] 21 Cong. Rec. 8706 (1890) (Rep. Moore); J. Ezell, *supra*, at 251; D. Weinstein & L. Deitch, *supra*, at 11.

[9] *Lotteries—Non-Mailable Matter*, 18 Op. Att'y Gen. 306, 309 (1885).

tery from soliciting customers through newspaper advertisements.

After several years of debate,[10] Congress closed that loophole by passing the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)). The constitutionality of that law was challenged in *In re Rapier*, 143 U.S. 110 (1892). Relying on *Ex parte Jackson*, *supra*, this Court upheld the 1890 Act over a First Amendment objection.

In response, the Louisiana Lottery moved its operations to Honduras and used a Florida express company to carry on its domestic business.[11] When Congress realized that the Louisiana Lottery still had not been shut down, Congress passed the Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (codified at 18 U.S.C. 1301), which outlawed transportation of lottery tickets in interstate or foreign commerce. The constitutionality of that Act was also challenged, and this Court, for the third time, upheld Congress's anti-gambling efforts in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), this time over a claim that the statute exceeded Congress's power under the Commerce Clause, Art. I, § 8, Cl. 3.

3. The 19th century federal anti-lottery legislation is still in effect today with respect to privately-run lotteries. The basic prohibition on the mailing or carrying in interstate commerce of lottery tickets or lottery advertisements survives as 18 U.S.C. 1301 and 1302. After the birth of radio and television, Congress enacted Section 316 of the Communications Act of 1934, ch. 652, 48 Stat. 1088, which prohibits radio and television stations from broadcasting "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. 1304, as amended by the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625,

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[10] There was considerable debate on whether applying the 1876 Act to newspapers would violate the First Amendment. See J. Ezell, *supra*, at 251-263; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 937-940. Supporters of the 1890 Act argued that it was constitutional under *Ex parte Jackson*, see S. Rep. No. 1579, 51st Cong., 1st Sess. (1890); S. Rep. No. 233, 48th Cong., 1st Sess. 1 (1884); S. Rep. No. 11, 49th Cong., 1st Sess. 12 (1886); H.R. Rep. No. 2678, 49th Cong., 1st Sess. 1-2 (1886); H.R. Rep. No. 787, 50th Cong., 1st Sess. Pt. 2, at 2-4 (1888) (Views of the Minority); 21 Cong. Rec. 8710 (1890) (Rep. Caldwell); *id.* at 8712 (Rep. Wilkinson), and noted that newspapers generally did not oppose extending the 1876 Act to include their publications, see S. Rep. No. 1579, *supra*, at 3 ("Many of the ablest and most influential journals now advocate the denial of mail facilities to any publisher who will admit a lottery advertisement to his columns, and it is believed that an enactment by Congress to this effect will meet with the almost unanimous approval of papers of known standing and ability."). Opponents claimed that *Ex parte Jackson* did not sanction the exclusion of newspapers from the mails, and that excluding newspapers from the mails because they published lottery advertisements would establish a precedent that in the future could be used to exclude from the mails commentary that other Congresses found detrimental to the public. See S. Rep. No. 233, *supra*, at 13-15 (Views of the Minority); H.R. Rep. No. 826, 48th Cong., 1st Sess. 2-4 (1884); H.R. Rep. No. 2678, *supra*, at 4-6 (Views of the Minority); H.R. Rep. No. 787, 50th Cong., 1st Sess. 1 (1888). Supporters of the 1890 Act ultimately carried the day.

[11] J. Ezell, *supra*, at 263-264, 267-268; G. Sullivan, *supra*, at 58; D. Weinstein & L. Deitch, *supra*, at 12; Blakey & Kurland, *supra*, 63 Cornell L. Rev. at 940-941; see *Report of the Postmaster-General*, H.R. Exec. Doc. No. 1, 52d Cong., 1st Sess. Pt. 4, at 17 (1891).

§ 3(a)(4), 102 Stat. 3206. The Federal Communications Commission can revoke a broadcaster's license for violating Section 1304. 47 U.S.C. 312(a)(6). These sections in the Criminal, Postal, and Communications Codes generally outlaw use of the mails and the airwaves to promote privately-run lotteries.[12]

On the other hand, Congress has modified this regulatory scheme to reflect the renaissance of state-operated lotteries. In 1975, after the rebirth of state-run lotteries in New Hampshire, New Jersey, and New York, Congress allowed newspapers and broadcasters to advertise such lotteries if the newspaper or broadcast licensee is located in a State with a state-run lottery. See 18 U.S.C. 1307. Section 1307, as amended by the Charity Games Advertising Clarification Act of 1988, *supra*, § 2(a), 102 Stat. 3205, permits advertising about state-sponsored lotteries "by a radio or television station licensed to a location in that State or a State which conducts such a lottery." 18 U.S.C. 1307(a)(1)(B). Congress adopted that exemption "to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States." S. Rep. No. 1404, 93d Cong., 2d Sess. 2 (1974). Congress sought to "mak[e] a reasonable balance between Federal and State interests in this area," including "the consideration and protection of the policies and interests of the States which do not provide for such lotteries." H.R. Rep. No. 1517, 93d Cong., 2d Sess. 5 (1974).

[12] Related provisions of Title 18 include: Section 1303, which prohibits any Postal Service officer or employee from acting as a lottery agent; Section 1305, which creates a special exemption for fishing contests; Section 1306, which bars financial institutions from selling lottery tickets for state-operated lotteries. Provisions in the Postal Code establish a procedure by which the Postal Service can refuse to deliver lottery-related materials. 39 U.S.C. 3001-3007.

4. This controversy over the constitutionality of 18 U.S.C. 1304 and 1307 arises from the different lottery policies of Virginia and North Carolina. North Carolina does not operate a state-run lottery and prohibits lotteries and lottery advertising. N.C. Gen. Stat. §§ 14-289, 14-290 (1991). By contrast, Virginia has had a state-conducted lottery since 1987, when Virginia voters approved a lottery by referendum. Va. Code Ann. §§ 58.1-4000 *et seq.* (1991 & Supp. 1992). The Virginia State Lottery Board spends millions of dollars each year on broadcast and print media lottery advertising, and private Virginia businesses purchase radio advertising identifying their status as lottery ticket outlets. Pet. App. 2a-3a, 12a-13a; J.A. 24-25. Under 18 U.S.C. 1304 and 1307, a broadcasting station licensed to Virginia locations may carry Virginia lottery advertisements, but a station licensed to North Carolina locations may not, even if its service area extends into Virginia.

B. The Proceedings In This Case

1. Respondent is a broadcasting corporation licensed by the FCC to operate an FM radio station in Elizabeth City, North Carolina, even though its studio and corporate offices are in Virginia Beach, Virginia. The station, whose call sign is WMYK (Power 94), broadcasts from Moyock, North Carolina, approximately three miles from the North Carolina-Virginia border. Due to its location, WMYK broadcasts to residents of both States. Roughly 127,000 North Carolina residents live in WMYK's service area.

Approximately 8% of its listeners reside in North Carolina, with the remainder in Virginia. WMYK's listeners comprise a small percentage of North Carolina's total population, and most of them receive information about the Virginia lottery from Virginia broadcast media and other sources. Pet. App. 2a, 6a, 10a-11a; J.A. 8, 26-27, 31-32, 45.

2. Respondent filed this action against the United States and the FCC in October 1988, five months after acquiring WMYK. Respondent asserted that 18 U.S.C. 1304 and 1307 violate its free speech rights under the First Amendment by preventing it from broadcasting Virginia lottery advertisements. Petitioners defended the statutes on the ground, inter alia, that they are lawful under *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328 (1986), and that they are a permissible regulation of commercial speech under the test announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557 (1980). The first inquiry under *Central Hudson* is whether the speech concerns a lawful activity and is not misleading. The second prong asks whether the government's interests in regulating the speech are "substantial." The third inquiry is whether the regulation "directly advances" the government's interests, and the fourth prong asks whether the government's regulation is no more extensive than is necessary to serve its interests. 447 U.S. at 566; see *Board of Trustees* v. *Fox*, 492 U.S. 469, 475-481 (1989). The last two steps "basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, 478 U.S. at 341; *Fox*, 492 U.S. at 480.

Acting on a stipulated record, see J.A. 18-32, the district court held that Section 1304 and Section 1307

are unconstitutional as applied to respondent. Pet. App. 10a-38a. After noting that the first step of the *Central Hudson* test was not at issue, *id.* at 20a-21a, the court concluded that the government had a substantial interest in protecting the ability of "non-lottery states to discourage gambling," *id.* at 21a-22a, and that the regulatory scheme was a reasonable means of accommodating the interests of lottery and non-lottery States, *id.* at 27a-28a. Nevertheless, the court ruled that the broadcast restrictions in Sections 1304 and 1307 did not directly advance the government's interests, because "North Carolinians in Power 94's service area experience pervasive exposure to Virginia lottery advertising through telecast, broadcast and print media" in Virginia. Pet. App. 26a; see *id.* at 22a-27a. Because application of those statutes to WMYK does not "substantially reduce the volume of advertising about the Virginia lottery" that reaches North Carolina residents, the court ruled, they "fail materially to protect North Carolina residents from the harms which may result from lottery advertising," and therefore fail the third prong of the *Central Hudson* test. *Id.* at 27a. The district court also rejected the government's suggestion that "under *Posadas*, commercial speech concerning activities which a state may ban entirely has no First Amendment protection, and that, therefore, restrictions upon advertising of casino gambling, cigarette, and alcohol sales, prostitution, and lotteries are not violative of the First Amendment." *Id.* at 30a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-9a. The majority concluded that Sections 1304 and 1307 satisfied the second and fourth steps of the *Central Hudson* test, Pet. App. 5a-6a, 7a, but ruled that the laws do not "directly advance" the government's interests as applied to WMYK, *id.*

at 7a. Because "[t]he North Carolina residents who might listen to Power 94 are inundated with Virginia's lottery advertisements," the majority reasoned, "[p]rohibiting Power 94 from advertising Virginia's lottery is ineffective in shielding North Carolina residents from lottery information." *Id.* at 6a-7a.

Judge Widener dissented. Pet. App. 8a-9a. He reasoned that while WMYK's North Carolina audience might be exposed to lottery information from Virginia, "[t]he fact that the legislation does not uniformly succeed in all instances is no reason to hold it unconstitutional." *Id.* at 9a. He also expressed doubt that the majority's ruling could be confined to what the majority called "the unique circumstances of this case." *Id.* at 6a, 9a. He pointed out that since "the electromagnetic waves of immense numbers of radio and television broadcasts, probably a majority of them, cross state lines, * * * if our decision is carried to its logical conclusion, as it will be, it will serve to completely invalidate the statutes involved." *Id.* at 9a.

SUMMARY OF ARGUMENT

I. Congress should be free to restrict commercial lottery advertising simply by virtue of its authority to restrict or ban lotteries and other forms of gambling, regardless of whether such a limitation satisfies the *Central Hudson* test. Sections 1304 and 1307 deny licensees the right to broadcast only a narrow category of commercial speech that plays a direct role in the conduct of an activity—gambling—that Congress and the States may discourage or suppress due to its potentially injurious activities. *Ex parte Jackson* and *In re Rapier* a century ago upheld prohibitions on the use of the mails to advertise lotteries,

and this Court in 1986 in *Posadas* upheld a similar restriction on the advertising of casino gambling. Society has long deemed advertising restrictions on activities like gambling or alcohol consumption reasonable because such restrictions are a necessary way to reduce consumer demand for an activity that is harmful, but cannot be brought to a halt.

II. Sections 1304 and 1307 are also constitutional under the standard that this Court announced in *Central Hudson* for determining the permissible bounds of the regulation of commercial speech. By limiting the commercial promotion of lotteries, the statutes advance the policies of those States that have forbidden private lotteries within their borders and that have declined to operate state lotteries. The two statutes are also narrowly tailored to advance the divergent interests of States that operate lotteries and those that do not, since broadcasters may advertise state-run lotteries if the State in which they are licensed operates one.

The courts below erroneously ruled that the statutes do not "directly advance" Congress's interests as applied to respondent because North Carolina residents receive advertisements about the Virginia Lottery from other sources. The courts below ignored the fact that the statutes serve two interests: discouraging lottery participation in States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. That respondent's listeners hear advertisements about the Virginia Lottery from broadcasters licensed in Virginia, accordingly, does not undermine Congress's regulatory scheme. In addition, because Congress's regulation of commercial speech is not subject to strict

scrutiny, that regulation should be upheld if it directly advances Congress's interests at a national level; Congress should not have to defend its laws on a station-by-station basis. Finally, Sections 1304 and 1307 are not unconstitutional on the ground that they are underinclusive. Congress could reasonably believe that restricting the advertising of lotteries will reduce consumer demand for that activity, which thereby furthers the interest of States that oppose lotteries.

ARGUMENT

THE STATUTORY RESTRICTIONS ON BROADCASTING LOTTERY ADVERTISEMENTS CONSTITUTIONALLY REGULATE COMMERCIAL SPEECH PROMOTING LOTTERIES

The courts below held that 18 U.S.C. 1304 and 1307 were unconstitutional as applied to respondent under the test that this Court adopted in *Central Hudson* to determine the constitutionality of the government's regulation of commercial expression. For the reasons given in Point II below, we submit that those courts misapplied the *Central Hudson* test and that the judgment below should be reversed. Before addressing that question, however, we believe that the Court should address the logically prior question of whether government regulation of the particular type of commercial speech in question here—speech promoting gambling—is even subject to the *Central Hudson* test. For the reasons stated in Point I, we submit that the government should be free to regulate such commercial speech regardless of whether the government can satisfy the *Central Hudson* test. For that reason, too, the judgment below should be reversed.

I. CONGRESS HAS THE POWER TO RESTRICT OR PROHIBIT USE OF THE BROADCAST MEDIA FOR ADVERTISING OF GAMBLING BY VIRTUE OF CONGRESS'S AUTHORITY TO BAN GAMBLING ALTOGETHER

A. Congress Has Long Had The Authority To Prevent Federal Instrumentalities From Being Used For The Commercial Promotion Of Lotteries

Since 1827, there has been a long-standing federal policy to assist the States in their efforts to reduce public participation in lotteries by preventing federal instrumentalities from being used to promote such enterprises. It has long been illegal to import lottery tickets in foreign commerce, to distribute such tickets or lottery advertisements in interstate commerce or through the mail, and to broadcast such advertisements over radio and television. 18 U.S.C. 1301, 1302, and 1304. This Court has three times upheld the constitutionality of that regulatory scheme: This Court rejected a Commerce Clause challenge to what is now 18 U.S.C. 1301 in *Champion* v. *Ames (Lottery Case)*, 188 U.S. 321 (1903), and twice rejected First Amendment challenges to 18 U.S.C. 1302, in *Ex parte Jackson*, 96 U.S. 727 (1878), and *In re Rapier*, 143 U.S. 110 (1892).

Ex parte Jackson involved a prosecution for depositing in the mails a letter containing a circular offering prizes in a lottery, in violation of the Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90 (codified at Rev. Stat. § 3894 (2d ed. 1878)), which prohibited the mailing of letters or circulars concerning lotteries. In upholding the Act against a First Amendment objection, this Court explained that "the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the

people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." 96 U.S. at 736. Analogizing the 1876 Act to a similar 1873 statute denying use of the mails to distribute obscene materials, the Court found that "[t]he same inhibition has been extended to circulars concerning lotteries, — institutions which are supposed to have a demoralizing influence upon the people." *Ibid.* The Court held that "we have no doubt" that it was lawful for Congress to do so. *Id.* at 737.

In re Rapier is to the same effect. There, the Court upheld the Anti-Lottery Act of 1890, ch. 908, § 1, 26 Stat. 465 (codified at Rev. Stat. § 3894 (Supp. 2d ed. 1891)), over a First Amendment challenge. Like the 1876 Act, the Anti-Lottery Act of 1890 made it a crime to advertise lotteries through the mails. Relying on *Ex parte Jackson*, *supra*, the Court rejected the argument that the Act violated the First Amendment. 143 U.S. at 134-135; accord *Horner* v. *United States (No. 1)*, 143 U.S. 207, 213 (1892); *Horner* v. *United States (No. 2)*, 143 U.S. 570, 578 (1892).[13]

[13] Before Congress modified the scheme in 1975 in order to allow advertising of state-run lotteries by certain licensees, the Second and Third Circuits concluded that Congress could altogether prohibit commercial promotion of state-run lotteries. See *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), cert. denied, 396 U.S. 1061 (1970); *New Jersey State Lottery Comm'n* v. *United States*, 491 F.2d 219 (3d Cir. 1974) (en banc), vacated and remanded on other grounds for consideration of mootness, 420 U.S. 371 (1975). The Second Circuit upheld the constitutionality of Section 1304 as applied to advertisements or information directly promoting a state-conducted lottery. 414 F.2d at 997, 998. The Third Circuit concluded that Section 1304 would be unconstitutional if it were applied to ban broadcasting of the winning number in a lawful state-run lottery, but also determined that it constitutionally could be applied to compensated broadcasts. 491 F.2d at 224. The Court granted certiorari to review the Third Circuit's ruling, but later ordered the case vacated and remanded for a determination of mootness after Congress adopted Section 1307. 420 U.S. 371 (1975).

More than a decade later, this Court noted probable jurisdiction over an appeal and a cross-appeal from the district court's decision in *Minnesota Newspaper Ass'n* v. *Postmaster General*, 677 F. Supp. 1400 (D. Minn. 1987), prob. juris. noted, 488 U.S. 815 (1988), which held that Section 1302 was constitutional as applied to advertisements, but was unconstitutional as applied to prize lists in news reports. After Congress passed legislation affecting the scope of Section 1302, and in light of the government's interpretation of the scope of Section 1302, the private-party plaintiff dismissed its challenge to Section 1302. See *Minnesota Newspaper Ass'n* v. *Postmaster General*, 488 U.S. 998 (1989) (plaintiff's-cross-appellant's voluntary dismissal under Sup. Ct. R. 53 of cross-appeal); *Frank* v. *Minnesota Newspaper Ass'n*, 490 U.S. 225 (1989) (dismissal of government's appeal as moot).

B. Developments In The Law Since *Ex parte Jackson* And *In re Rapier* Have Not Undercut Congress's Authority To Restrict The Commercial Promotion Of Lotteries

1. Since the Court last addressed the constitutionality of this regulatory scheme, there have been three important developments. The first is a societal change toward lotteries. For most of our history, the States were unanimous in the belief that lotteries, like other forms of gambling, were a disfavored activity and that the public should be foreclosed or discouraged from participating in them. Although the States generally still embrace that policy as to private lotteries, many States, facing budgetary problems, now operate state lotteries and—not surprisingly—

encourage the public to try the State's games of chance.

Paralleling that development is the second one: the emergence of a new congressional regulatory scheme for lottery advertising. Because of the birth of state-run lotteries, Congress has partially lifted the advertising barrier in the Criminal, Postal, and Communications Codes in order to accommodate what has become a divergent set of interests possessed by States that run lotteries and States that do not. Under the current regulatory scheme, a radio or television station broadcasting from a State with a state-run lottery can broadcast advertisements about that lottery or any other state-run lottery, while a station that broadcasts from a State without a state-operated lottery cannot broadcast lottery advertisements about any lottery. The laws in question, 18 U.S.C. 1304 and 1307, use a geographically-based bright line to draw that distinction.

The last important development is the birth of the commercial speech doctrine. At one time, commercial speech was thought not to implicate the First Amendment at all. See *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). Since 1976, however, commercial speech has been entitled to some degree of constitutional protection. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Broadcasters also enjoy First Amendment protection. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 380 (1984).

2. In light of these three developments, the question is whether Congress may still exclude from the mails and the broadcast media certain expression associated with gambling. The answer is yes. Although some of the language in *Ex parte Jackson* and

In re Rapier about the scope of government's regulatory power would have to be qualified today, the holdings of those cases—that Congress may use its power over interstate instrumentalities to assist the States in the regulation of lotteries—remain fully valid.

a. The Court has made clear that government may regulate or ban speech that is fraudulent or that proposes an illegal transaction. See, *e.g.*, *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Friedman* v. *Rogers*, 440 U.S. 1, 9-10 & n.9 (1979); *Central Hudson*, 447 U.S. at 563-564; *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).[14] Furthermore, the Court has made clear

[14] On several occasions this Court has upheld over First Amendment challenges the constitutionality of 39 U.S.C. 3005 and 3007, which authorize the Postmaster General to bring administrative and judicial proceedings in order to intercept mailings designed to promote fraudulent schemes. See *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178 (1948); *Lynch* v. *Blount*, 404 U.S. 1007 (1972), aff'g summarily 330 F. Supp. 689 (S.D.N.Y. 1971) (three-judge court); *Outpost Dev. Corp.* v. *United States*, 414 U.S. 1105, aff'g summarily 369 F. Supp. 399 (C.D. Cal. 1973) (three-judge court); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (1904). The Court relied on *In re Rapier* in upholding those laws. *Public Clearing House* v. *Coyne*, 194 U.S. at 508 (relying on *Rapier*); *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. at 190-191 (relying on *Coyne*). That principle has also been endorsed in subsequent decisions. See, *e.g.*, *United States Postal Service* v. *Athena Products, Ltd.*, 654 F.2d 362, 366-368 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982) (upholding 39 U.S.C. 3005 and 3007 over a First Amendment challenge); *Original Cosmetics Products, Inc.* v. *Strachan*, 459 F. Supp. 496 (S.D.N.Y.

that even commercial speech truthfully promoting a lawful activity may in some cases be banned altogether not in spite of, but precisely because of, its content. *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 341 (1986) (gambling advertising); *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138, 142 (Ohio), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982) (alcohol advertising); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), aff'd summarily, 405 U.S. 1000 (1972) (broadcast cigarette advertising).

This Court's 1986 decision in *Posadas* is illustrative. In that case, the Court upheld regulations prohibiting the commercial advertising of casino gambling to the residents of Puerto Rico, even though casino gambling and other forms of gambling were legal in that jurisdiction. The Court ruled that Puerto Rico has a legitimate interest in restricting the commercial advertising of casino gambling in order to safeguard society's moral well-being, and to prevent the corruption and infiltration of organized crime that, unfortunately, often shadows organized gambling. 478 U.S. at 341. Moreover, the Court ruled that restricting commercial advertising is a rational way to advance those interests, since the government could reasonably believe that the commercial advertising of casino gambling would enhance the demand for that activity. *Id.* at 341-342. The restriction was

1978), aff'd mem., 603 F.2d 214 (2d Cir.), cert. denied, 444 U.S. 915 (1979) (§ 3005); *Hollywood House Int'l, Inc.* v. *Klassen*, 508 F.2d 1276 (9th Cir. 1974) (§ 3005); *United States Postal Service* v. *Beamish*, 466 F.2d 804, 806-807 (3d Cir. 1972) (§ 3007).

also reasonably tailored to Puerto Rico's interest in safeguarding the welfare of its citizens, because it was focused on residents. *Id.* at 343-344. Finally, the Court held that since Puerto Rico could outlaw gambling altogether, it could take the less restrictive step of banning the commercial advertising of that activity. *Id.* at 345-347. As the Court later summarized: "In *Posadas* the Court concluded that 'the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.'" *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988) (quoting *Posadas*, 478 U.S. at 345-346).

Posadas is controlling here as well. Sections 1304 and 1307, like the gambling advertising restriction in *Posadas*, regulate expression promoting an activity that Congress and the States may prohibit altogether. Government historically has had the authority under the police power to outlaw gambling to protect the public against the harms traditionally associated with that activity. *Posadas*, 478 U.S. at 345; *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-357; *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). Opponents of gambling have long argued that it contributes to corruption and the growth of organized crime; that it underwrites bribery, narcotics trafficking, and other crimes; that it imposes a regressive tax on the poor, the persons who are least able to bear that burden; and that it offers a false but sometimes irresistible hope of financial advancement.[15] The belief that

[15] See, *e.g.*, the Congressional Statement of Findings and Purpose Preceding the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923, 18 U.S.C. 1961 note; President Nixon's Message on Organized Crime, H.R. Doc.

gambling is harmful is therefore rational. In fact, the Court expressly so held in *Posadas*. 478 U.S. at 341.

The States may also treat lotteries in the same manner as any other form of gambling. At one time, this Court expressed the view that lotteries are beset with "inherent vices," and that it "cannot admit of a doubt" that they are "demoralizing in their effects, no matter how carefully regulated." *Stone* v. *Mississippi*, 101 U.S. 814, 818 (1880). During the last century it was accepted wisdom that "the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." *Phalen* v. *Virginia*, 49 U.S. (8 How.) 163, 168 (1850); see *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 355-356. More recently, it has been noted that "[p]eriodically every form of commercial gambling has been infected by corruption, attesting to the unique attraction between organized crime groups and gambling's financial promise. Horse racing, casino operations, professional sports, state run lotteries—legal gambling of all kinds has been infiltrated in some form, at some time or other, by organized crime." 7 President's Comm'n on Organized Crime, *Hearing on Organized Crime and Gambling* vi (1985).

No. 105, 91st Cong., 1st Sess. 5-6 (1969); S. Rep. No. 617, 91st Cong., 1st Sess. 71 (1969); S. Rep. No. 1579, 51st Cong., 1st Sess. 1, 4 (1890); *Brown* v. *Hotel & Restaurant Employees Local 54*, 468 U.S. 491, 494-495 (1984); *Phalen* v. *Virginia*, 49 U.S. (8 How.) at 168; President's Comm'n on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 2 (1967); President's Comm'n on Organized Crime, *Interim Report to the President and the Attorney General—The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* 51 (1984); *Gambling* 74-88, 678-734; G. Sullivan, *supra*, at 45-49, 120-128.

The government's interests at stake here are the same ones that persuaded that Court in *Ex parte Jackson* and *In re Rapier* to uphold the provisions in the Postal Code that served as the predecessors to 18 U.S.C. 1304. This Court reasoned that Congress has the authority under the Postal Clause of the Constitution, Art. I, § 8, Cl. 7, to prohibit the use of the mails to promote lotteries, since participating in a lottery is not a fundamental right and since Congress had not barred newspapers from distributing lottery-related materials by means other than the mails. In so ruling, the Court recognized that Congress could support the States' effort to safeguard the public against the harmful effects of gambling by excluding lottery-related promotional materials from the mails. *In re Rapier*, 143 U.S. at 134-135; *Ex parte Jackson*, 96 U.S. at 736-737.

That rationale is still valid today. Participating in a lottery, like any other form of gambling, is not a constitutionally protected activity. The federal government and the States may regulate gambling, or prohibit it altogether. *Posadas*, 478 U.S. at 345.[16] Even today, most States still prohibit most forms of

[16] Accord, *e.g.*, *Lewis* v. *United States*, 348 U.S. 419, 422-423 (1955), overruled in part on other grounds, *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358; *Ah Sin* v. *Wittman*, 198 U.S. 500, 505-507 (1905); *Otis* v. *Parker*, 187 U.S. 606, 609 (1903).

privately-run organized gambling, such as casinos, and regulate other forms of gambling, including bingo. It is doubtless true that lotteries are no longer held in the same disrepute they enjoyed when this Court decided *Ex parte Jackson* and *In re Rapier*. Attitudes change over time, sometime cyclicly, as new demons replace old ones. Indeed, with respect to lotteries, our attitudes may have returned to the same phase of the cycle that existed in the colonial period, when lotteries were considered an acceptable activity, or "were thought pardonable at least." *Otis* v. *Parker*, 187 U.S. 606, 609 (1903). Forty-five States now permit some form of gaming, such as bingo. S. Rep. No. 446, 100th Cong., 2d Sess. 11-12 (1988). Many run state lotteries, or permit private ones. States have adopted state-run lotteries as an alternative to raising taxes and see them as a means of tapping into money that otherwise might be taken in by organized crime; private enterprises use lotteries as a means of attracting customers; and charitable organizations use lotteries as fundraising devices. H.R. Rep. No. 557, 100th Cong., 2d Sess. Pt. 1, at 4 (1988). But the debate over the wisdom or morality of lotteries has always been undertaken in the legislatures, not in the courts. There it should remain.

b. History also clearly reveals that society has long prohibited or greatly limited the advertising that can be used to promote activities deemed harmful, such as gambling, as a means of limiting consumer demand for and the growth of such undertakings. Gambling may be outlawed entirely. As a matter of policy, the experience with Prohibition, however, suggests that a flat ban on certain activities, such as the consumption of alcohol, can prove more harmful than a system of regulation allowing that

activity to be conducted under strict oversight and control. Governments thus compromise: They permit some forms of gambling to operate, but limit their operation. A common limitation is to restrict or forbid advertising, because advertising spurs demand. As Professor Richard Epstein has summarized, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 65 (1988):

> One reason to legalize gambling is simply damage control. It is better that people not gamble, not only for their own personal character, but also for the corrosive effect gambling has on family and business obligations. Nonetheless, it is just too costly to try to control gambling by criminal sanctions. Better therefore to legalize the "disfavored" activity, which can then be taxed to keep participation within reason. Disfavored activities, moreover, need not be treated like all other business activities. Advertisement stimulates business, so it might be proper for a state to decide that, while it should not ban gambling, it should nonetheless moderate its growth by banning advertising.

The broadcast lottery regulatory scheme, which was patterned after the similarly structured Postal Code, parallels the one upheld in *Posadas*. Just as the Puerto Rico legislature has general police power, Congress has the authority under the Commerce Clause, Art. I, § 8, Cl. 3, to ban the distribution in interstate or foreign commerce of lottery materials, such as tickets, *Champion* v. *Ames (Lottery Case)*, 188 U.S. at 356-358, or to regulate local forms of gambling that affect interstate commerce, *United States* v. *Hawes*, 529 F.2d 472, 477-478 (5th Cir. 1976) (col-

lecting cases); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir.) (Stevens, J.), cert. denied, 414 U.S. 857 (1973) (upholding over Commerce Clause challenge 18 U.S.C. 1955, which makes it a crime to conduct a gambling business in violation of state law). See generally *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Congress therefore could have outlawed all lotteries, privately- or state-run, that are in or affect interstate commerce. Instead, Congress chose to restrict their ability to use the mail and to broadcast advertisements over the airwaves. This Court upheld such a judgment long ago in *Ex parte Jackson* and *In re Rapier*. *Posadas* shows that Congress's judgment is a permissible one today. As the Court explained in *Posadas*: "It would * * * surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand." 478 U.S. at 346. The Constitution does not put Congress to the choice between a total ban on an activity or unlimited advertising of it. *Posadas* shows that Congress has a third choice—*viz.*, restricting the advertising of that activity. "To rule out the latter, intermediate kind of response would require more than we find in the First Amendment." *Posadas*, 478 U.S. at 347. In sum, *Posadas* reveals that the Court's decisions in *Ex parte Jackson* and *In re Rapier* have not been eclipsed by the modern development of the commercial speech doctrine.

c. To be sure, Congress has not completely prohibited all broadcast lottery advertising. Congress has created an exception for broadcasters operating in states with state-run lotteries. 18 U.S.C. 1307. But that exception is not inconsistent with the overall regulatory scheme. Congress could rationally believe that state-run lotteries are less likely to become large-scale gambling syndicates—latter-day versions of the Louisiana Lottery—because of state oversight and control. See G. Sullivan, *By Chance a Winner: The History of Lotteries* 122-123 (1972). At the same time, the exception accommodates the interests of the States, like Virginia, that operate lotteries themselves. S. Rep. No. 1404, *supra*, at 2; H.R. Rep. No. 1517, *supra*, at 5. That exercise in federalism is a legitimate undertaking for Congress. Cf. *South Carolina* v. *Baker*, 485 U.S. 505, 512-513 (1988). Congress's regulatory scheme cannot be challenged on the ground that it is impermissibly under[illegible]sive, since 18 U.S.C. 1307 classifies on the basi[illegible] legality of lotteries in the broadcaster's state, n[illegible]e basis of the content of speech; the race, sex, religion, or political affiliation of the speaker; or some other, irrational factor. See *R.A.V.* v. *St. Paul*, 112 S. Ct. 2538, 2543, 2546-2547 (1992); *id.* at 2555 (opinion of White, J.). In sum, the limited advertising restriction in Section 1307 does not undercut the legitimacy of Congress's efforts.[17]

[17] Even if the Court were to replace the *Central Hudson* test with stronger protection for commercial speech, the decision in *Posadas* should remain good law. Society has traditionally forbidden advertising of activities normally considered a "vice," such as gambling or consuming alcohol. Such activities could reasonably be deemed to constitute a class by themselves.

II. THE ADVERTISING RESTRICTIONS SATISFY THE *CENTRAL HUDSON* TEST TO MEASURE THE VALIDITY OF GOVERNMENT REGULATION OF COMMERCIAL SPEECH

Regardless of whether the Court believes that the advertising of gambling should be treated the same as advertising of noninjurious activities, the judgment below should be reversed because the courts below misapplied the *Central Hudson* test. Under that test, the government may restrict lawful commercial speech if the government's interest is substantial, if the restriction directly advances that interest, and if the restriction is narrowly tailored to serve that interest. *Fox*, 492 U.S. at 475-481; *Central Hudson*, 447 U.S. at 566. In ruling that 18 U.S.C. 1304 and 1307 could not constitutionally be applied to respondent, the courts below repudiated the geographic bright-line rule that Congress deliberately selected in order to balance the divergent interests of anti- and pro-lottery States. Their repudiation of the line purposefully drawn by Congress rests on several basic errors of First Amendment analysis; it ignores the Court's most recent and directly analogous commercial speech precedent, *Posadas*; and it compromises the integrity and workability of a regulatory scheme that Congress revisited and decided to maintain only four years ago.

A. The Advertising Restrictions Advance Several Legitimate Governmental Interests

The first step in the *Central Hudson* inquiry relevant here is whether the government has a substantial interest in restricting the speech at issue. *Posadas*, 478 U.S. at 340-341; *Central Hudson*, 447 U.S. at 566. Sections

1304 and 1307 advance several substantial governmental interests. First, by prohibiting the commercial promotion of private lotteries, they further the policies of States that have forbidden gambling within their borders. Second, by restricting the interstate growth of private lotteries, Section 1304 helps to reduce the threat of organized criminal infiltration of gambling enterprises and makes it easier for the States that allow private lotteries to police that activity. Third, by allowing state-run lotteries to be advertised, Congress has also allowed the States to maintain a local monopoly over lottery activity in order to raise state revenues. In sum, for the reasons stated in Point I, those interests clearly are "substantial" under *Central Hudson*.

B. The Advertising Restrictions Are Narrowly Tailored To Advance The Government's Legitimate Interests

The last prong of the *Central Hudson* test asks whether the government's restriction is narrowly tailored to advance the government's legitimate interests. *Fox*, 492 U.S. at 480; see *Central Hudson*, 447 U.S. at 566. This Court discussed in detail the nature of this inquiry in *Fox*. 492 U.S. at 475-481.

Fox explained that the *Central Hudson* test does not require that commercial speech restrictions satisfy the "least restrictive means" test used in other areas of constitutional law. 492 U.S. at 476-477. Drawing an analogy to the Court's cases dealing with so-called "time, place, and manner" restrictions on speech—cases in which the Court had expressly rejected use of a "least restrictive means" test to gauge the legality or restrictions on speech, see, *e.g.*, *Ward* v. *Rock*

Against Racism, 491 U.S. 781, 798-799 (1989); *United States* v. *Albertini*, 472 U.S. 675, 687-689 (1985); *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984) (plurality opinion); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984)—the Court in *Fox* concluded that "it would be incompatible with the asserted subordinate position [of commercial speech] in the scale of First Amendment values to apply a more rigid standard" to such speech. 492 U.S. at 478 (internal quotation marks omitted). At the same time, because commercial speech is a form of speech and is entitled to greater protection than purely commercial undertakings, the Court said that it would "require the government goal to be substantial, and the cost to be carefully calculated." *Id.* at 480. As the Court summarized, what the First Amendment requires is "a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but * * * a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Ibid.* (citations and internal quotation marks omitted).

Both courts below correctly held that Sections 1304 and 1307 satisfy that standard. Pet. App. 7a, 27a-28a. Those statutes seek to accommodate divergent interests. Under Section 1307, Congress freed broadcasters to promote lotteries if the station is licensed to a State that runs a lottery, while restricting the commercial promotion of lotteries by broadcasters who are

licensed to States that outlaw them. That bright-line rule, resting on the geographic boundaries of the different States, reasonably attempts to satisfy the interests of each category of States without trammelling the interests of either one. Indeed, as the district court explained, "[s]hort of leaving regulation to the states, it is difficult to envision a more narrowly-tailored set of provisions than those set forth in sections 1304 and 1307." Pet. App. 28a. Perhaps the best proof of that fact is that respondent did not even challenge in the court of appeals the district court's ruling in this regard. *Id.* at 7a.

C. The Advertising Restrictions Directly Advance The Government's Legitimate Interests

The courts below concluded that Sections 1304 and 1307 cannot constitutionally be applied to respondent because those laws do not "directly advance" the government's interests and thus do not meet the third prong of the *Central Hudson* test. The courts' reasoning, however, is flawed in several independently fatal respects.

1. *The advertising restrictions accommodate the divergent interests of the States toward state-run lotteries*

The court of appeals' majority's first error was its failure to recognize that Sections 1304 and 1307 are designed to serve not one interest, but two: discouraging lottery participation in the States that do not sponsor lotteries *and* accommodating lottery participation and promotion in the States that do. H.R. Rep. No. 1517, *supra*, at 5; S. Rep. No. 1404, *supra*, at 2. The simultaneous pursuit of these two interests reflects a single unifying purpose with deep roots in

federalism and history: namely, assisting the States in their pursuit of independent social and economic policies regarding gambling.

Under *Central Hudson*, the question is whether Sections 1304 and 1307 "directly advance" the two interests being simultaneously pursued by Congress. The answer to that question is clearly yes. On their face, Sections 1304 and 1307 directly advance both interests by allowing broadcast lottery advertising in lottery States while prohibiting it in non-lottery States. See S. Rep. No. 1404, *supra*, at 3 ("the accommodation afforded by [Section 1307] meets the essential needs of lottery States without unnecessarily encroaching on non-lottery States"). And even as applied in this case, Sections 1304 and 1307 satisfy the direct advancement test, since they allow lottery advertising by Virginia's stations while preventing lottery advertising by a North Carolina station that reaches more than 100,000 North Carolina residents.

This Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests. In *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981), the Court rejected a First Amendment challenge to a San Diego ordinance that, for safety and esthetic reasons, banned *offsite* billboard advertising but permitted *onsite* billboard advertising and other specified commercial signs. In upholding the ordinance, the Court deferred to San Diego's policy judgment about the balance to be struck "between the city's land-use interests and the commercial interests of those seeking to purvey goods and services," 453 U.S. at 512 (plurality opinion); *id.* at 541 (opinion

of Stevens, J., concurring in part and dissenting in part). The Court held that San Diego could resolve this balance in favor of restricting one source of advertising (offsite billboards) but against restricting another source (onsite billboards) without running afoul of *Central Hudson*'s direct advancement test. By the same token, Congress should be free to balance the competing interests of non-lottery and lottery States by restricting advertising from one source (stations licensed to locations in non-lottery States) while allowing lottery advertising from another source (stations licensed to locations in lottery States). The fact that the results are imperfect in some circumstances does not mean that Sections 1304 and 1307 fail to "directly advance" the balance sought by Congress.

2. The reasonableness of the advertising restrictions must be evaluated on a national, not a station-by-station, basis

The courts below not only failed to consider both interests advanced by Sections 1304 and 1307, but also failed to measure the reasonableness of the " 'fit' between [Congress's] ends and the means chosen to accomplish those ends," *Posadas*, 478 U.S. at 341, at the appropriate level of generality. Relying upon the effect that those statutes have on respondent, the courts held that Sections 1304 and 1307 do not directly advance Congress's interests *as applied to respondent's station, WMYK*. Pet. App. 6a-7a, 23a-27a. But that type of analysis would require courts to undertake a station-by-station evaluation of the reasonableness of Congress's scheme as applied to every broadcaster in the nation. This Court has demanded

that kind of exact "fit" only when strict scrutiny is appropriate, as in the case of political speech, and has never required such precision in the context of commercial speech.

Metromedia and *Posadas* illustrate that point. This Court did not suggest in *Metromedia* that a store-owner could challenge the billboard ordinance on the ground that, since the vicinity of the business was already greatly cluttered with other forms of visual blights (such as garish storefronts), permitting that business to use a billboard to advertise would not marginally injure San Diego's interests in traffic safety and esthetics. 453 U.S. at 508-512 (plurality opinion); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part). Likewise, the Court in *Posadas* did not suggest that each individual casino owner would be free to claim that the law was unconstitutional as applied to him, because the public knew that he ran a casino. 478 U.S. at 341-343. Instead, in each case the Court explained that the relevant inquiry was whether the legislature's judgment was reasonable as a general matter, not whether it was reasonable as applied to every affected party. By requiring Congress to shoulder such a heavy burden, the courts below misunderstood the teaching of *Metromedia* and *Posadas*.

There is also no reason to force Congress to adopt a foolproof advertising regulatory scheme. In *Fox*, the Court rejected a "least restrictive means" approach to the last prong of the *Central Hudson* test, 492 U.S. at 478-480, and the Court's reasons for refusing to adopt such a strict form of judicial scrutiny apply here too. The "field" of commercial speech has traditionally been subject to governmental regulation, *id.* at 481, especially when speech concerns what has long been deemed a "vice," such as gambling, and here too it is difficult for legislatures to know just how much regulation is necessary to restrict the public's demand for such an activity, *id.* at 480-481. Legislatures need more leeway than would be justified when political speech is at issue and must be free to experiment with a variety of regulatory measures in order to limit consumer demand to whatever level is deemed appropriate. That goal is attainable only if legislatures can make across-the-board judgments for the benefit of society as a whole, even if that judgment proves ineffectual or irrational when applied to a specific individual. Congress should not therefore be saddled with the burden of justifying advertising restrictions when applied to every broadcaster.

As stated above, *Posadas* explained that this prong of the *Central Hudson* test measures the "fit" between the means and ends that Congress has chosen. 478 U.S. at 341. It therefore may be valuable to draw an analogy to equal protection principles, where the same type of "means-ends" scrutiny is performed. This Court's decision in *Vance* v. *Bradley*, 440 U.S. 93 (1979), is instructive in that regard. The Court there upheld as rational a statute requiring Foreign Service personnel to retire at age 60. The Court recognized that there could be disagreement over the question whether a 60-year-old was less capable of performing as a Foreign Service officer than someone a decade younger, *id.* at 111-112, but nonetheless held that Congress has the power to resolve factual disputes, and that Congress's determination could not be challenged unless it "ha[d] no reasonable basis for believing" that 60 years was an appropriate retirement

age, *id.* at 111. In so ruling, the Court did not suggest that a 60-year-old Foreign Service officer could challenge the statute on the ground that he could prove that he was as fit as someone who was ten years junior to him. That result would require a type of perfect fit between the statutory means and ends that this Court in *Vance* eschewed. *Id.* at 108 ("in a case like this 'perfection is by no means required' "). Although the *Central Hudson* test is more exacting than the "rational basis" test that is used under equal protection analysis, *Fox*, 492 U.S. at 480, it is not a form of strict scrutiny, see *id.* at 476-481, and therefore does not demand the perfection that respondent supposes. For that reason, just as a particular Foreign Service officer could not claim that the mandatory retirement age was irrational in his case, so, too, respondent should not be heard to complain that the line drawn by 18 U.S.C. 1304 and 1307 imposes an arbitrary restraint in his particular case.

To be sure, the effects that an advertising restriction have on a particular broadcaster are relevant. They may suggest that the restriction was designed to serve an illegitimate purpose, or that Congress cannot hope to accomplish its stated goals with its chosen means even when viewed at a national level, if the effect on one broadcaster is the same as the effect on them all. But that is not how the courts below measured the effects of Sections 1304 and 1307 on respondent's radio station. The courts below believed that the statutes were unconstitutional if they prevented WMYK from selling advertising time promoting the Virginia Lottery without also making some contribution to Congress's goals. Yet, unless a statute must make progress toward its goals in the case of each regulated party—a requirement that the

Court has never imposed in the commercial speech area—the fact that a statute sometimes proves ineffectual does not render it unconstitutional.

3. *The advertising restrictions are not invalid because they are "underinclusive"*

a. The majority limited its attention to only one of the interests served by Sections 1304 and 1307, that of protecting non-lottery States. As shown above, the failure to take account of *both* interests underlying those statutes was error. But even if it were proper to look only to Congress's interest in supporting the policies of non-lottery States, Sections 1304 and 1307 would still pass muster under *Central Hudson*.

In reaching a contrary conclusion, the majority relied on the fact that WMYK's North Carolina audience already receives a substantial volume of Virginia lottery advertising from Virginia media. Pet. App. 6a-7a. In essence, the majority held that, as applied in this case, Sections 1304 and 1307 are fatally underinclusive: that is, too much commercial speech about the Virginia Lottery has been left unrestrained for Sections 1304 and 1307 to "directly advance" Congress's goal in this case.

That underinclusiveness theory is misconceived, since mere underinclusiveness—*viz.*, the failure to restrain other types of commercial speech that convey similar information and pose similar risks—is not fatal under the direct advancement test of *Central Hudson*. Because the electromagnetic waves of radio and television broadcasts cross state lines, as Judge Widener noted in his dissent below, Pet. App. 9a, the contrary interests of lottery and non-lottery States regarding broadcast lottery advertising cannot be ac-

commodated perfectly. Cf. S. Rep. No. 1404, *supra*, at 3 (Section 1307 shaped by recognition that "broadcast transmission cannot be halted at an arbitrary boundary"). But the First Amendment does not demand perfection when commercial speech is involved. In particular, this Court has made clear that a legislature is free to restrict one source of commercial speech while allowing another, as Congress has done here, as long as it is reasonably attempting to reconcile competing interests.

The Court's decision in *Metromedia* is again illustrative. In *Metromedia*, San Diego's billboard ordinance was attacked as impermissibly underinclusive because of its failure to ban onsite as well as offsite advertising. This Court squarely rejected that argument: "[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising." 453 U.S. at 511 (plurality opinion); *id.* at 541 (opinion of Stevens, J., concurring in part and dissenting in part).

Relying on *Metromedia*, this Court again rejected a similar underinclusiveness argument in *Posadas*. The restrictions on casino gambling advertising were challenged in *Posadas* on the ground that other forms of gambling, such as horse racing, cockfighting, and the Puerto Rico lottery, could be advertised to the residents of the island. The Court squarely ruled that "whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling 'directly advance' the legislature's interest in reducing demand for games of chance." 478 U.S. at 342. The Court also concluded that the

legislature had targeted its ban at casino gambling, because it believed that "the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico," *id.* at 343, and that the narrowly-focused advertising restrictions at issue would, in the legislature's view, thereby "reduce demand for casino gambling," *id.* at 342. *Posadas*, like *Metromedia*, therefore rejected an underinclusiveness claim that does not differ in any material respect from the one endorsed by the courts below.

Indeed, the court of appeals made no effort to come to grips with *Posadas*.[18] Yet *Posadas* strikes at the heart of its rationale. As we explained in Point I, if the "greater power" to ban gambling necessarily includes the "lesser power" to ban gambling advertising, then respondent's claimed First Amendment right to broadcast lottery advertising wholly lacks merit. But even if *Posadas* does not render per se lawful ordinary restraints on the advertising of gambling like the ones in Sections 1304 and 1307, *Posadas* certainly offers strong support for the constitutionality of those laws under *Central Hudson*, both facially and as applied in this case. After all, there is no reason to believe that the restriction on casino gambling advertising in *Posadas*, which exposed the local residents to gambling advertising as long as it was not "aimed" at them, was any more effective, to paraphrase the court of appeals, at "shielding [Puerto Rico's] residents from [gambling] information," Pet. App. 7a, than Congress's geographic restriction on lottery advertising here. *Posadas* shows

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[18] Though discussed extensively by the district court and the parties on appeal, *Posadas* is not even cited by the court of appeals, much less distinguished.

that an added measure of judicial deference is due when a legislature makes a judgment about the effect of advertising restrictions on activities such as gambling. No such deference can be found in the majority's opinion in this case.

b. Aside from being inconsistent with this Court's cases, the court of appeals' underinclusiveness rationale is misguided because *Central Hudson*'s direct advancement standard is not primarily an empirical test, with courts gauging the efficacy of a statutory restraint and invalidating it whenever they deem it to be ineffective.[19] Such an approach would involve the judiciary in a quintessential legislative task. The direct advancement standard asks a different, more qualitative question: whether there is a logical or common sense link, not an indirect or speculative one, between the restraint imposed by Congress and the policies sought to be advanced. That is how this Court has described the test. See *Posadas*, 478 U.S. at 342 (the direct advancement step is met when the legislative judgment is "a reasonable one"); *Metromedia*, 453 U.S. at 508-509 (plurality opinion) (the direct advancement step is met when the legislative judgment "is not manifestly unreasonable"; accepting "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that bill-

[19] This Court arguably undertook such an inquiry in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where the Court struck down a law prohibiting the mailing of unsolicited advertisements for contraceptives. Such heightened scrutiny was warranted in *Youngs Drug Products*, however, only because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected." *Posadas*, 478 U.S. at 345. Here, by contrast, the underlying conduct (gambling) is not constitutionally protected, and could be prohibited altogether. *Ibid.*

boards are real and substantial hazards to traffic safety"); cf. *Fox*, 492 U.S. at 480-481. As long as such a link exists between the restraint imposed and the interests pursued, underinclusiveness does not disable a statute and prevent it from "directly advancing" those interests. Whether the restriction is "worth it" is a judgment for the legislature.

It can hardly be gainsaid that there is a direct connection between restrictions on lottery advertising and lottery participation. This Court held in *Posadas* that a legislature may reasonably conclude that restricting the advertising of gambling will reduce the consumer demand for that activity, and will thereby further the government's interest in protecting the public from the harms associated with gambling. 478 U.S. at 341-343. That ruling is consistent with other decisions by this Court and the lower federal and state courts holding that a legislature reasonably may believe that a restriction on the advertising of alcoholic beverages will reduce alcohol consumption and the injuries that drinking can cause.[20] That conclusion also makes economic sense. Banning adver-

[20] See *Queensgate Inv. Co.* v. *Liquor Control Comm'n*, 433 N.E.2d 138, 142 (Ohio), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 749-750 (5th Cir. 1983) (en banc), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490, 501 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); *S&S Liquor Mart, Inc.* v. *Pastore*, 497 A.2d 729, 734-735 (R.I. 1985); *Rhode Island Liquor Stores Ass'n* v. *Evening Call Pub. Co.*, 497 A.2d 331, 335-337 (R.I. 1985); cf. *Republic Entertainment, Inc.* v. *Clark County Liquor & Gaming Licensing Bd.*, 672 P.2d 634 (Nev. 1983); *Princess Sea Indus., Inc.* v. *Nevada*, 635 P.2d 281 (Nev. 1981), cert. denied, 456 U.S. 926 (1982).

tising of a product makes it costly for consumers to learn about and purchase that good. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 25-28 (1979). Advertising restrictions therefore are a sensible way to reduce consumer demand for a product.

c. Respondent argues that Sections 1304 and 1307 serve the interests of neither Virginia nor North Carolina when applied to respondent. According to respondent, its Virginia audience is denied advertising about that State's lottery, while its North Carolina audience is exposed to Virginia lottery advertising from a variety of other sources. Br. in Opp. 8-10. Respondent contends that, as applied, Sections 1304 and 1307 have on effect whatever on the exposure of North Carolina residents Virginia lottery advertising, that Sections 1304 and 1307 "accomplish[] nothing," are "wholly ineffective" and "advance[] no governmental interest whatsoever," and that those statutes necessarily fail *Central Hudson*'s direct advancement test. Br. in Opp. 7, 10, 11. There are several flaws in that argument.

First, the record does not support respondent's repeated assertions that Sections 1304 and 1307 "accomplish nothing" as applied to respondent. The district court itself acknowledged that, as applied to respondent, Sections 1304 and 1307 probably *do* reduce the exposure of North Carolina residents to Virginia lottery advertising, albeit only to a limited extent. See Pet. App. 23a. In the district court's words, "[i]t is probably true that a relatively small number of North Carolina listeners who listen only

or mainly to Power 94 may hear significantly less lottery advertising" because of Sections 1304 and 1307, and that "other North Carolinians may hear slightly less lottery advertising because they occasionally listen to Power 94." Pet. App. 23a. Thus, contrary to respondent's suggestion, Br. in Opp. i, this case does not present the question whether the First Amendment is violated by "a ban on commercial speech that is wholly ineffective * * * when applied to a particular speaker." The district court concluded that Sections 1304 and 1307 are not "wholly ineffective," even as applied to respondent.

Second, in applying *Central Hudson*'s direct advancement test, respondent considers one of the two interests served by Sections 1304 and 1307—the interest in furthering North Carolina's anti-lottery policy—and altogether ignores the other interest—the interest in accommodating Virginia's state lottery. The statutes seek to advance both policies simultaneously in order to vindicate Congress's underlying goal of advancing federalism. In these circumstances, it is inevitable that these statutes will not insulate respondent's North Carolina audience from Virginia lottery advertising as well as would a single-minded, flat ban on all lottery advertising. But that hardly means that Sections 1304 and 1307 fail to "directly advance" Congress's interests in this setting. The limited impact of the laws on North Carolina residents in this case is inherent in Congress's accommodation of the divergent state lottery policies. To hold this attempt unconstitutional would be to hold that one of the legitimate interests furthered by Sections 1304 and 1307 must be sacrificed to serve the other. Nothing in *Central Hudson* or its

progeny requires any such result, and respondent cites no authority to support such a claim.

In fact, the Court rejected a similar argument in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). New York City had adopted a noise ordinance requiring concert performers at a city park to use sound amplification equipment and a sound technician provided by the city. There, as in this case, the city offered divergent justifications for its rule: the interest in limiting sound volume for nearby residents, and the interest in ensuring that the sound volume was adequate for concert listeners. The Court held that "[i]t is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances." 491 U.S. at 800. The Court also held that the city's interest in ensuring that sound volume was adequate supported the city's regulation, even if the regulation were unnecessary in the case of the plaintiff's concerts, "which apparently were characterized by more-than-adequate sound amplification," *id.* at 801. As the Court explained, *ibid.*:

> [T]hat fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it.

The Court concluded that "[c]onsidering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline." *Ibid.*

The Court's decision in *Ward* v. *Rock Against Racism* undermines respondent's argument. Although *Ward* involved a "time, place, and manner restriction" on expression, the Court made clear in *Fox*, 492 U.S. at 47, that "application of the *Central Hudson* test was 'substantially similar' to the application of the test for validity of time, place, and manner restrictions upon protected speech." The Court's ruling in *Ward* that "the validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case," 491 U.S. at 801, therefore applies here too. And when Sections 1304 and 1307 are so analyzed, they clearly satisfy the *Central Hudson* test.

d. The Fourth Circuit's underinclusiveness approach is ironic because it effectively condemns Congress under the First Amendment for *relaxing* restrictions on lottery advertising. Before 1975, when Congress passed Section 1307, federal law imposed an absolute ban on broadcast lottery advertising. Pp. 6-8, *supra*. If Congress had never enacted Section 1307, leaving undisturbed the unqualified ban on lottery advertising in Section 1304, it could not seriously be argued that Section 1304 failed to "directly advance" Congress's interest in protecting the policies of non-lottery States. It is only because Congress *relaxed* the once-absolute prohibition on lottery advertising that

the courts below could condemn under *Central Hudson* the one remaining restriction in the broadcast regulatory scheme. The court of appeals' decision therefore has the perverse effect of condemning Sections 1304 and 1307 precisely because those laws permit *more* speech to be broadcast than would be the case if Section 1307 never had been enacted at all. Nothing in *Central Hudson* requires such a perverse result.[21]

Respondent finds such a result is defensible, on the theory that a comprehensive ban affects all broadcasters equally, while the partial lifting of broadcast restrictions brought about by Section 1307 "creates favored and disfavored speakers." Br. in Opp. 15-16.[22] But respondent's argument assumes that Sec-

[21] Indeed, if WMYK's listeners are as "inundated with Virginia's lottery advertisements" as the court of appeals believed, Pet. App. 6a-7a, the ruling below is double ironic. After all, the speech at issue here is not speech that expresses a political, scientific, or artistic opinion, but is merely speech that proposes a commercial transaction. See *Fox*, 492 U.S. at 473-474; *Posadas*, 478 U.S. at 340; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762. Under the facts discussed by the courts below, there is little (if any) injury to the First Amendment interests of WMYK's audience, and no injury to respondent's ability to engage in discourse. The only injury is to respondent's ability to turn a profit by selling air time for lottery advertisements.

[22] Respondent even suggests that the geographic distinctions drawn by Sections 1304 and 1307 offend not only the First Amendment, but equal protection principles as well. Br. in Opp. 15 n.14. Equal protection principles, however, add nothing to the protections afforded by the First Amendment under *Central Hudson*. If the "fit" between statutory means and ends passes muster under *Central Hudson*, the demands of equal protection are necessarily satisfied as well. This Court made that point expressly in *Posadas*. 478 U.S. at 344 n.9; cf. *Fox*, 492 U.S. at 480.

tions 1304 and 1307, as applied here, serve only to "silence one voice among many" without advancing any governmental interest. Br. in Opp. 16. As explained above, it is both a factual and legal fallacy to claim that the laws do not advance the government's interests as applied in this case. Also, far from silencing "one voice among many," Sections 1304 and 1307 prohibit *all North Carolina licensees* from broadcasting lottery advertising. Respondent is not being singled out; instead, it is being subjected to a general geographic restriction that applies to all other broadcasters throughout the State. That restriction is an eminently sensible means of pursuing Congress's legitimate goals, and it is not unconstitutional merely because it is less effective in one instance than in others. See *Ward*, 491 U.S. at 801.

In any event, Sections 1304 and 1307 are not unconstitutional even if they do have the effect of favoring some broadcasters over others. There is no hint in Sections 1304 and 1307 of any intent to silence particular speakers because of their opinion about the desirability of lotteries. Rather, Congress has sought to protect the anti-gambling policies of non-lottery States without silencing broadcasters in States runing a state lottery. If those divergent interests are legitimate ones, and we submit that they are, then Congress *does* have the authority to silence some speakers (*e.g.*, broadcasters in North Carolina) in favor of others (*e.g.*, broadcasters in Virginia) in order to achieve those interests. Any discrimination in this regard is the inevitable consequence of allowing Congress to balance competing interests.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment provides in part as follows:

Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

2. 18 U.S.C. 1304 provides as follows:

Broadcasting lottery information

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

3. 18 U.S.C. 1307 provides as follows:

Exceptions relating to certain advertisements and other information and to State-conducted lotteries

(a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to—

(1) an advertisement, list of prizes, or other information concerning a lottery conducted by a

State acting under the authority of State law which is—

(A) contained in a publication published in that State or in a State which conducts such a lottery; or

(B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery; or

(2) an advertisement, list of prizes, or other information concerning a lottery, gift enterprise, or similar scheme, other than one described in paragraph (1), that is authorized or not otherwise prohibited by the State in which it is conducted and which is—

(A) conducted by a not-for-profit organization or a governmental organization; or

(B) conducted as a promotional activity by a commercial organization and is clearly occasional and ancillary to the primary business of that organization.

(b) The provisions of sections 1301, 1302, and 1303 shall not apply to the transportation or mailing—

(1) to addresses within a State of equipment, tickets, or material concerning a lottery which is conducted by that State acting under the authority of State law; or

(2) to an addressee within a foreign country of equipment, tickets, or material designed to be used within that foreign country in a lottery which is authorized by the law of that foreign country.

(c) For the purposes of this section (1) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States; and (2) "foreign country" means any empire, country, dominion, colony, or protectorate, or any subdivision thereof (other than the United States, its territories or possessions).

(d) For the purposes of subsection (b) of this section "lottery" means the pooling of proceeds derived from the sale of tickets or chances and allotting those proceeds or parts thereof by chance to one or more chance takers or ticket purchasers. "Lottery" does not include the placing or accepting of bets or wagers on sporting events or contests. For purposes of this section, the term a "not-for-profit organization" means any organization that would qualify as tax exempt under section 501 of the Internal Revenue Code of 1986.

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